In The

Supreme Court of the United States

October Term, [redacted] 1969

No. 375

PAUL C. WARE,

Petitioner,

vs.

STATE OF MINNESOTA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

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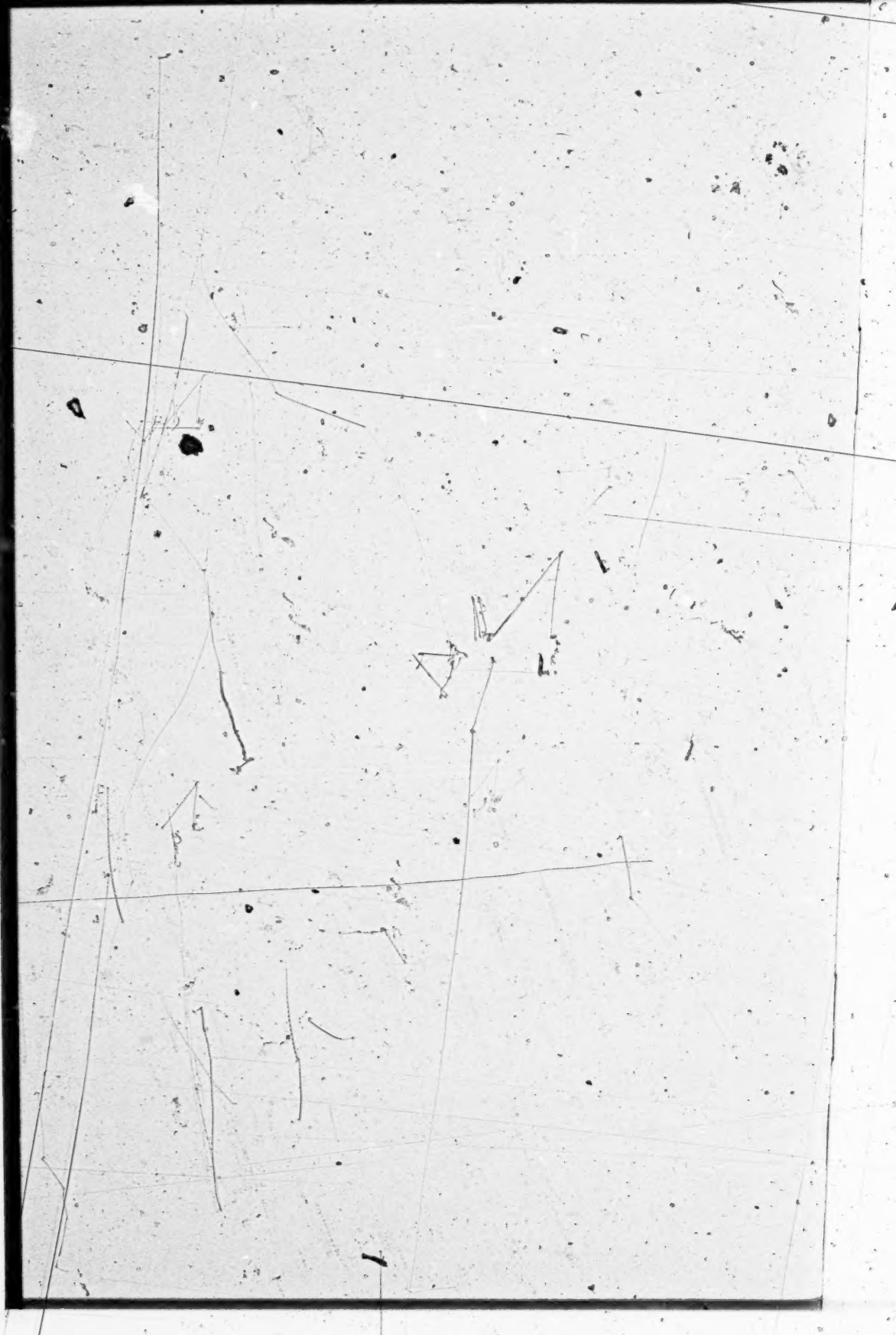

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STATE OF MINNESOTA,

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PETITION FOR A WRIT OF CERTIORARI TO THE MINNESOTA SUPREME COURT

Paul C. Ware, your petitioner, prays that a writ of certiorari issue to review the judgment of the Minnesota Supreme Court entered in the above case on June 13, 1969.

CITATION OF OPINIONS BELOW

The order of the District Court, Hennepin County, Minnesota, is unreported. A copy of this order is printed in Appendix "B," *infra*, p. 11. The opinion of the Minnesota Supreme Court has not been reported yet. This opinion is printed in Appendix "B," *infra*, pp. 12-14.

JURISDICTION

The judgment of the Minnesota Supreme Court was entered on June 13, 1969. The jurisdiction of this Court is invoked under 28 *U.S.C.* Section 1257(3).

QUESTIONS PRESENTED

1. Whether arraignment is a crtical stage in a criminal proceeding in Minnesota so that an indigent defendant was deprived of his right to the assistance of counsel when he appeared at the arraignment without counsel and a not guilty plea was entered for him by the court.

2. Where a defendant is charged with first degree murder and the record discloses confusion over whether a bullet from the defendant's pistol was the bullet that killed the decedent, does the advice of counsel to plead guilty to a charge of second degree murder and the acceptance of that plea by the court constitute inadequate representation and a denial of the right to counsel and of due process of law?

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provisions involved are the right to counsel provided by the Sixth Amendment and the due process clause of the Fourteenth Amendment. They are printed in Appendix "A," *infra*, p. 10.

STATEMENT OF THE CASE

Petitioner, Paul C. Ware, is presently confined in the Minnesota State Prison for a conviction upon a plea of guilty to the charge of murder in the second degree. Petitioner had been indicted by the grand jury for first degree murder for the shooting death of one Reuben Belser on October 9, 1959. The shooting incident occurred at the Northside Inn in Minneapolis. The police had been called to the scene because of an argument between petitioner and a waitress. Gunfire was exchanged between petitioner and several of the police officers. As a result petitioner was shot three times, one police officer was wounded and a bystander, Reuben Belser, was killed.

Petitioner, a Negro with a tenth-grade education, was ar-

raigned on a charge of first degree murder on November 24, 1959. He appeared at the arraignment without counsel. Although required by *Minnesota Statutes*, §630.10 (1967), to inform petitioner that he had a right to have counsel before being arraigned and to ask him if he desired counsel, the court did not do so. Instead, the court entered a not guilty plea and then referred the case to the public defender. The entire transcript of the arraignment was printed in the Supplemental Record filed with the Minnesota Supreme Court in this proceeding. On December 7, 1959, after two brief interviews with the public defender (Affidavit of Defendant accompanying petition for Writ of Error Coram Nobis), petitioner entered a plea of guilty to a charge of murder in the second degree.

A Petition for Post Conviction Remedy to Vacate and Set Aside Conviction and to Discharge Petitioner was filed in the District Court, Hennepin County, Minnesota on October 5, 1967. (Appellant's Brief and Appendix A.5.) That petition was based on three grounds: that petitioner was denied his constitutional right to counsel at the arraignment; that he was inadequately represented by the public defender and that the trial court improperly accepted his guilty plea. On January 23, 1968, the petition was denied and dismissed without an evidentiary hearing. Upon appeal to the Minnesota Supreme Court the decision was affirmed on June 13, 1969.

In a previous post conviction proceeding for a writ of error coram nobis the issue of inadequate representation by counsel had been raised on the ground that the evidence conclusively established that petitioner had not intentionally fired the pistol that resulted in Mr. Belser's death. According to petitioner's affidavit in that proceeding, he had been struck by three bullets prior to firing his pistol and claimed that his firing was accidental or due to some reflex movement made while he was unconscious. Also, he was under sedation and suffering pain from his wounds at the time he

pleaded guilty. That petition was denied and the denial was affirmed by the Minnesota Supreme Court. *State v. Ware*, 267 Minn. 191, 126 N.W.2d 429 (1964).

The present claim that petitioner was inadequately represented by counsel is based upon the fact that the evidence presented at the time the guilty plea was accepted indicates doubt as to whether a bullet from petitioner's pistol was the one that killed the decedent. The existence of confusion in the record as to the caliber of bullet that caused decedent's death was not considered in the coram nobis proceeding. According to the testimony, petitioner had a .45 caliber pistol at the time of the shooting. (R. 11)[1] At one point in his testimony he was asked if the weapon was a Browning. He said he did not think so. (R. 12) At another point in his testimony he identified a Browning nine millimeter pistol as the one he had at the time of the shooting. (R. 23) Mr. Frane Johnson, a member of the Minneapolis Police Department, testified that the police carry .38 caliber pistols. (R. 16) Since two different calibers of bullets were fired during the shooting the caliber of the bullet that killed the decedent was a crucial fact.

Dr. William G. Guthrie, who performed the autopsy on Mr. Belser, testified that there were two bullets in Mr. Belser's body. (R. 18-22) He described one as a new bullet, which was the bullet that caused the death, and the other as an "old bullet" that was found on the inside of decedent's chest and had been completely grown over by tissue. (R. 18-22). Dr. Guthrie's testimony is conflicting as to the type of bullet that was the cause of death. When asked to distinguish between the old and new bullets, Dr. Guthrie's testimony on

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[1]The transcript of this proceeding was filed with the trial court and thus was part of the record. This transcript was printed in its entirety in the coram nobis proceeding, *State v. Ware*, 267 Minn. 191, 126 N.W.2d 429 (1964), and the citations herein are to the printed record in that proceeding.

direct examination was that the old bullet was a .38 caliber bullet and that "the other one was a bullet such as we find in these nine millimeter guns." (R. 21) On cross examination, however, Dr. Guthrie's testimony was just the reverse and he identified the new bullet as the .38 caliber one. (R. 22-23)

Despite this confusion neither petitioner's attorney nor the trial court sought to clarify the record as to the caliber of the fatal bullet. The trial court's examination related only to petitioner's personal background and did not involve any of the details of the shooting. (R. 13-14) It was not until after the plea of guilty was accepted and sentence imposed that petitioner was asked to identify the pistol he had used during the shooting. (R. 23) Further, there is no evidence in the record to establish that petitioner understood the elements of the charge of first degree murder at the time he agreed to plead guilty to second degree murder.

The federal questions here presented regarding whether petitioner was deprived of his right to counsel when he was arraigned without counsel and a not guilty plea was entered by the court and whether he was deprived of due process of law and his right to counsel when he was inadequately represented by counsel were raised in the petition for post-conviction remedy filed in the District Court, Hennepin County, Minnesota. When that petition was denied and dismissed without an evidentiary hearing, the federal questions were raised on appeal to the Minnesota Supreme Court in the statement of legal issues in Appellant's Brief. That court affirmed, holding that a defendant does not have the right to counsel at arraignment in Minnesota and that there was no basis on the record for a claim of inadequate representation by counsel. Petitioner's federal claims were thus made timely and properly. The denial of those claims gives this Court jurisdiction to review the judgment on writ of certiorari.

REASONS FOR GRANTING THE WRIT

1. The Minnesota Supreme Court, by its opinion in this case and its prior decision in *State ex rel. Lacklineo v. Tahash,* 267 Minn. 237, 126 N.W.2d 646 (1964), has decided that arraignment is not a critical stage in a criminal proceeding in Minnesota and, therefore, that a defendant does not have a constitutional right to counsel at that stage. The Minnesota court asserts that since a plea entered at the arraignment can subsequently be withdrawn at the discretion of the court in order to assert a substantive or procedural right or defense, an accused is not prejudiced by the absence of counsel at arraignment. The effect of this decision is to make the right to counsel at arraignment in Minnesota a right that exists only if, in the discretion of the court, the accused is prejudiced by the absence of counsel when a plea is entered for him.

This decision of the Minnesota Supreme Court is not in accord with the applicable decisions of the United States Supreme Court. This Court has declared that an accused is entitled to counsel at any critical stage in a criminal proceeding, without regard to a showing of prejudice. See *Hamilton v. Alabama,* 368 U.S. 52 (1961), which held that "when one pleads to a capital charge without benefit of counsel, we do not stop to determine whether prejudice resulted." *Hamilton* regarded arraignment as a critical stage in Alabama because certain rights had to be asserted then or they were waived. *White v. Maryland,* 373 U.S. 59 (1963), further defined a critical stage in a criminal proceeding to include one in which the accused entered a plea before the magistrate. And, *Mempa v. Rhay,* 389 U.S. 128 (1967), declared that: "appointment of counsel for an indigent is required at every stage of a criminal proceeding where substantial rights of a criminal accused may be affected." The Minnesota Supreme Court recognizes that the right to counsel at arraignment ex-

ists in capital cases, *State ex rel. Lacklinco v. Tahash, supra,* 126 N.W.2d at 650, n. 6, but ignores the fact that *Gideon v. Wainwright,* 372 U.S. 335 (1963), abolished any distinction between capital and noncapital cases as far as the right to counsel is concerned.

Arraignment in Minnesota is a critical stage because a plea is entered at that time and certain defenses must be asserted before the plea is entered or they are waived. Thereafter, those defenses can be asserted only if the court allows the defendant to withdraw the plea, a matter that is within the discretion of the court. Among the substantive and procedural rights or defenses that were waived when the not guilty plea was entered for petitioner were the following: (1) Objection to jurisdiction over the person, *State ex rel. Boswell v. Tahash,* 278 Minn. 468, 154 N.W.2d 813, 817 (1967); (2) double jeopardy, *State v. Warner,* 165 Minn. 79, 205 N.W. 692, 693 (1925); (3) a claim of a defect in the indictment, *State v. Schumm,* 47 Minn. 373, 50 N.W. 362 (1891); (4) objection to the propriety of the complaint and illegality of arrest, *State ex rel. Dahr v. Tahash,* 275 Minn. 377, 147 N.W.2d 382 (1966); failure to provide or delay in holding a preliminary hearing, *State ex rel. Welper v. Rigg,* 254 Minn. 10, 13, 93 N.W.2d 198, 201 (1958). The fact that arraignment is a critical stage in Minnesota is also evidenced by the statutory requirement that:

> If the defendant shall appear for arraignment without counsel, he shall be informed by the Court that it is his right to have counsel before being arraigned, and shall be asked if he desires the aid of counsel.

Minnesota Statutes §630.10 (1967). The trial court ignored this statutory requirement and entered a not guilty plea for petitioner without ever informing him of his right to counsel. See also *State v. Roy,* 266 Minn. 6, 122 N.W.2d 615, 619, *cert. denied,* 375 U.S. 956 (1963), in which the dissenting opinion stated:

> I take issue with the majority's statement that "arraignment in this state is not, from the standpoint of due process, a critical stage of the proceedings." We have very recently indicated the law is otherwise. In State ex rel. Becker v. Tahash, 265 Minn. ...., ..., 122 N.W.2d 100, 103, we referred to the arraignment and plea as "the critical period of the proceedings."

The Minnesota Supreme Court's opinion in this case rests on the assumption that any rights lost by the entry of a plea are not irretrievably lost because the accused can move to withdraw his plea to assert those rights. Such an assumption is not supported by actual experience. For example, in *State v. Perra*, 266 Minn. 545, 125 N.W.2d 44 (1963), *cert. denied*, 377 U.S. 982 (1964), the defendant was not allowed to raise the defense of a delay of six days before he was brought before a magistrate for a preliminary hearing. Similar to the procedure followed in the present case the defendant there had appeared without counsel at the arraignment and the court entered a not guilty plea. Because the defendant then proceeded to trial without seeking to withdraw his plea in order to assert as a defense a delay of six days in bringing him before a magistrate for a preliminary hearing, he was not allowed to raise that defense.

Clearly, the right to withdraw a plea at the discretion of the court in order to assert a defense cannot be equated to the assistance of counsel prior to the entry of a plea. Petitioner and numerous other prisoners in Minnesota who appeared for arraignment without counsel and entered a plea or had a plea entered for them by the court have been deprived of their right to counsel. The importance of this case is demonstrated by the fact that the entry of a not guilty plea by the court at arraignment and prior to appointment of counsel is common in certain areas of Minnesota. See Kamisar & Choper, "The Right to Counsel in Minnesota: Some Field Findings and Legal Policy Observations," 48

MINN. L. REV. 1, 37 (1963). Review of this case by writ of certiorari is necessary to prevent the right to counsel at arraignment in Minnesota from being a right that exists only at the discretion of the court.

2. Not only was petitioner deprived of his right to counsel at arraignment, but he was also denied his right to counsel by the inadequate representation of the public defender. Neither the public defender nor the court attempted to dispel the confusion over whether a bullet from petitioner's pistol killed the decedent. Evidence in the police files as well as newspaper accounts of the incident indicate that the police may have fired first. If that was the case it would support petitioner's contention that he fired his pistol as a reflex action after having been shot and thus lacked the requisite intent to have been convicted of first degree murder. Petitioner's counsel failed to bring such facts to the court's attention at the time that petitioner entered a plea of guilty to a charge of second degree murder.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Date: July 21, 1969.

APPENDIX A

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of Counsel for his defence.

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

APPENDIX B

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
D.C. File 45925

Paul C. Ware,

Petitioner,

vs.

State of Minnesota,

Respondent.

ORDER

The above captioned matter came on for hearing before this Court pursuant to the Petition for Post-Conviction Relief of the above named Petitioner, the Answer and Motion to Dismiss of the Respondent, and the Briefs of the respective parties. Robert A. Minish appeared as attorney for the Petitioner; George M. Scott, County Attorney, by Henry W. McCarr, Jr., Assistant County Attorney, appeared as attorney for the Respondent.

WHEREFORE, the Court being fully advised in the premises, and upon all the pleadings, files and papers herein,

IT IS HEREBY ORDERED That the Petition for Post-Conviction Relief be, and hereby is, in all respects denied and dismissed.

Dated: January 22, 1968.

By the Court:

/s/ TOM BERGIN
Judge of District Court

No. 66 Hennepin County Per Curiam

Paul C. Ware,

Appellant,

41331 vs.

State of Minnesota,

Respondent.

Heard before Knutson, C. J., and Otis, Rogosheske, Sheran and Peterson, JJ.

OPINION

PER CURIAM.

This is an appeal from an order dismissing, without an evidentiary hearing, a petition for postconviction relief alleging denial of petitioner's constitutional right to counsel. Although such summary disposition is ordinarily inappropriate, we think the situation in this case is sufficiently exceptional to preclude reversal.

1. Petitioner's first contention is that he was wholly denied counsel at a critical stage in the criminal proceeding when, at arraignment and prior to availability of counsel, the trial court directed the entry of a plea of not guilty. Petitioner does not, however, undertake to establish that he suffered any particular prejudice as a result of the court-directed plea. He simply asserts, upon the authority of Hamilton v. Alabama, 368 U.S. 52, 82 S.Ct. 157, 7 L. ed. (2d) 114, that prejudice should in effect be presumed. This contention obviously would not in this posture have been illuminated had an evidentiary hearing been held.

We perceive no likelihood that petitioner was prejudiced by the court's entry of a not guilty plea pending appointment

of counsel. What we said in State ex rel. Lacklineo v. Tahash, 267 Minn. 237, 241, 126 N.W.(2d) 646, 650, is fully applicable here:

> "Petitioner argues that because he was without the assistance of counsel upon arraignment, he failed to object when the information was not read and a plea of not guilty was entered without his consent, thereby foreclosing an examination of the proceedings prior to arraignment with the aid of counsel and the opportunity, if so advised, to challenge jurisdiction, to challenge the sufficiency of the information, or to take advantage of numerous other procedural steps available to him as of right at the time of arraignment but thereafter only at the discretion of the court. He contends that under due process an accused 'requires the guiding hand of counsel at every step in the proceedings against him' as declared in Powell v. Alabama, 287 U.S. 45, 69, 53 S.Ct. 55, 64, 77 L.ed. 158, 170. The manifest and fatal weakness of this argument is that it exalts theoretical possibilities and ignores what in fact occurred. Counsel was appointed immediately after it was determined that petitioner was indigent and before arraignment was completed or had reached the stage where it could be regarded as reasonably likely that any available defenses might be waived or irretrievably lost. * * * Although a plea of not guilty was entered by the court, a fair reading of the record indicates that it was not done with any purpose of foreclosing petitioner's right to make any motions or assert any defenses by way of answer to the information. There is no intimation that the court would not have vacated the not-guilty plea upon request."

We in effect held, as we do now, that in cases of a not guilty plea being entered without the consent of the accused it would be an abuse of judicial discretion to deny his motion to withdraw his not guilty plea in order to assert a substantive or procedural right or defense. See, also, Lacklineo v. Tahash (8 Cir.), 351 F.(2d) 58; Madison v. Tahash (D. Minn.), 249 F.Supp. 600, leave to appeal denied (8 Cir.), 359 F.(2d) 60; DeToro v. Pepersack (4 Cir.), 332 F.(2d)

341. This arraignment situation is plainly distinguishable, therefore, from the uncertainties and potential prejudice which existed at the arraignment in Hamilton v. Alabama, *supra,* and, of course, White v. Maryland, 373 U.S. 59, 83 S.Ct. 1050, 10 L. ed. (2d) 193.

2. Petitioner's second contention is that the public defender, when subsequently appointed to represent him, did so inadequately by permitting him to plead guilty to second-degree murder in the face of serious doubt as to his guilt of the crime. The basis of doubt, as he argues, was in the confusion and inconsistency of the coroner's testimony as to whether the victim died from a bullet of the kind fired from petitioner's gun or the police guns and in his alternative claim that any shooting from his gun was the result of reflex action as he himself was felled by police bullets. A careful examination of all the circumstances and the testimony to which petitioner refers discloses no basis for such doubt. This claim of inadequate counsel is not new, moreover, for it has been previously considered at length and rejected in coram nobis proceedings instituted by petitioner more than 5 years ago. State v. Ware, 267 Minn. 191, 126 N.W. (2d) 429. His assertion of these same claims for postconviction relief a second time is in our opinion an abuse of process. Summary disposition without further evidentiary proceedings was in these circumstances not improper.

Affirmed.